IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL NEWBERG,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 02-CV-1670
	:	
JOHN POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,	:	
Defendant.	:	

ORDER

AND NOW, this day of March, 2003, upon consideration of: (i) Defendant's Motion to Dismiss or in the Alternative for a More Definite Statement (Document No. 7, filed September 10, 2002); (ii) Plaintiff's Response to the Motion (Document No. 13, filed March 14, 2003)[1]; and (iii) Defendant's Reply to the Response (Document No. 11, filed January 28, 2003) it is hereby **ORDERED** as follows.

I. STANDARD OF REVIEW

Rule 12(b) of the Federal Rules of Civil Procedure states, in relevant parts, that, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be

[1]This Court received Plaintiff's Response by letter on January 6, 2003, and Plaintiff was directed to officially file his Response with the Clerk of Court. Plaintiff failed to comply with the Court's directives, and on March 14, 2003, the Court officially filed Plaintiff's Response with the Clerk of Court in an effort to expedite the review of Defendant's Motion.

granted." The standard of review for a Rule 12(b)(6) motion differs from the review of a Rule 12(b)(1) motion. In a Rule 12(b)(6) motion to dismiss, the court will assume the truth of all plaintiff's well-pleaded facts and view them in the light most favorable to the plaintiff, and the court will dismiss the complaint only when the plaintiff cannot prove a set of facts, in support of the claim, for which relief may be granted. See Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); City of Philadelphia v. Lead Industries Ass'n, Inc., 994 F.2d 112 (3d Cir. 1993). Furthermore, a "pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976)(quoting Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972)(quotations omitted)); Milhouse v. Carlson, 652 F.2d 371, 373 (3d Cir. 1981). In a Rule 12(b)(1) challenge there is only a light burden on the plaintiff to prove subject matter jurisdiction. In deciding the motion, the court "may review any evidence to resolve factual disputes concerning the existence of jurisdiction," Mortenson v. First Federal Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977), and the court is not constrained by the plaintiff's complaint.

II. DISCUSSION

A. 12(b)(6) Analysis

The Third Circuit in Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996), articulated a tripartite test to establish a *prima facie* case of discrimination under the Rehabilitation Act of

1973, as amended, 29 U.S.C. §§ 701-796, by demanding the plaintiff prove that: (i) he/she has a disability; (ii) that he/she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (iii) that he/she was nonetheless terminated or otherwise prevented from performing the job. In accordance with 29 U.S.C. § 705(20)(B), the first prong of the Shiring test requires the plaintiff to prove that he/she is an "individual with a disability." Specifically, the designation of an "individual with a disability" is established only if: (i) the plaintiff has a physical or mental impairment which substantially limits one or more major life activities; (ii) the plaintiff has a record of such an impairment; or (iii) the plaintiff is regarded as having such an impairment. See Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380 (3d Cir. 2002).[2] Accordingly, as a precursor to showing a disability, the plaintiff must demonstrate the he/she has a physical or mental impairment that substantially limits a major life activity. Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 195, 122 S. Ct. 681, 690, 151 L. Ed. 2d 615 (2002). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," 45 C.F.R. § 84.3(j)(2)(ii). The term "substantially" serves as a qualifier, and suggests that impairments with minor affects on major life activities will not suffice under the statute. See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565, 119 S. Ct. 2162, 2168, 144 L. Ed. 2d 518 (1999).

Plaintiff has not shown that he qualifies as "an individual with a disability" under the Rehabilitation Act because he cannot demonstrate that he has a physical or mental impairment

[2]This Third Circuit opinion evaluates the test for an "individual with a disability" under the Americans with Disabilities Act ("ADA"), and although we are construing the definition as it applies to the Rehabilitation Act, the elements of the test under the ADA are substantially similar to the test under the Rehabilitation Act, and we therefore find this case to be authoritative.

which substantially limits one or more of his major life activities. The Plaintiff contends that he was a chronic depressant, but does not establish a nexus between that mental impairment and the substantial debilitating affect the impairment has on a major life activity. Clearly, Plaintiff has a gripe with his supervisor, Mr. Bryant, and although Mr. Bryant might be partially responsible for Plaintiff's depression, that in itself does not show that Plaintiff categorically cannot function in a major life activity, i.e., working. Plaintiff has the capability of working with and around Mr. Bryant, but he simply prefers not to, and therefore it appears beyond a doubt that Plaintiff cannot prove a set of facts enabling him to hurdle the first prong in the tripartite discrimination test.

B. 12(b)(1) Analysis

A fraud claim against the United States or any of its agencies will be dismissed for want of subject matter jurisdiction absent the United States's explicit waiver of sovereign immunity for fraud claims. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, provides a limited source of waiver and allows negligence actions to be brought against the United States, however, "courts have consistently held that fraud claims against the government are not permitted under the FTCA." Beneficial Consumer Discount Co. v. Poltonowicz, 47 F.3d 91, 96 (3d Cir. 1995). See also McNeily v. United States, 6 F.3d 343, 349 (5th Cir 1993)(§ 2680(h) acts as the "fraud and misrepresentation" exception to the FTCA). Therefore, Plaintiff's claim against the government based upon Mr. Bryant's alleged "fraudulent statements," must be dismissed for lack of subject matter jurisdiction.

III. CONCLUSSION

Based on the foregoing reasons, Defendant's Motion to Dismiss, pursuant to Fed. R. Civ.

P.12(b)(6) and (1), is **GRANTED**, and Defendant's Alternative Motion for a More Definite Statement is **DENIED AS MOOT**. This is a final legal judgment and the Clerk of Court is directed to statistically close this matter.

BY THE COURT:

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Legrome D. Davis, U.S.D.J.